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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

Mary Tom Investment, Inc.,

Petitioner,

vs.

C. Dewitt Wiley, Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN SUPPORT OF OPPOSITION

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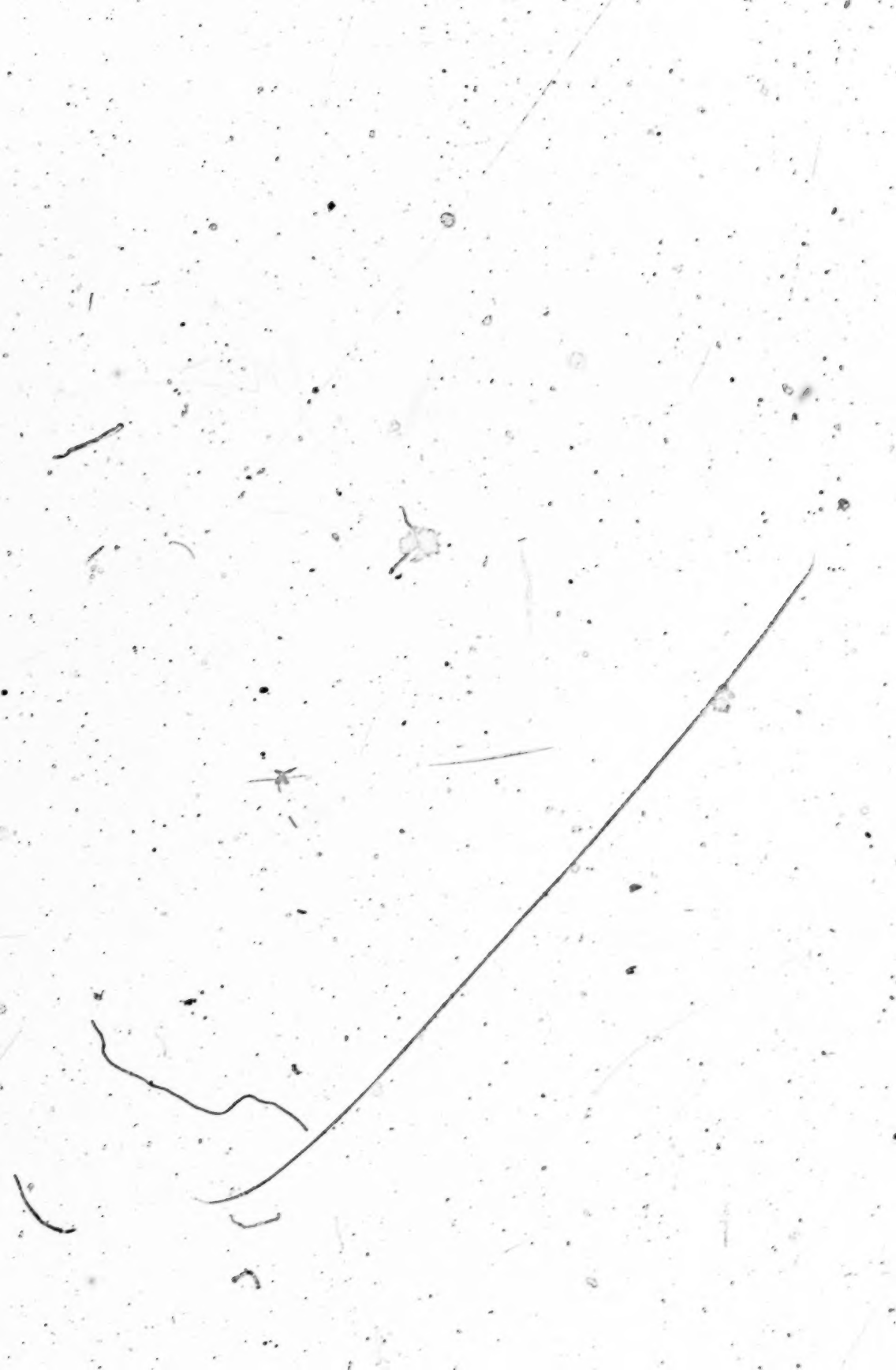

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

BASIC TOOL INDUSTRIES, INC.,

Petitioner,

vs.

C. DOUGLAS WIKLE, Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion of the Referee in Bankruptcy, and his Findings of Fact, Conclusions of Law and Order, are unreported, but appear at pages 25-30 of the Record.[1] The District Court for the Southern District of California did not render a written opinion; its Order affirming the Referee in Bankruptcy is unreported, but appears at pages 38-39 of the Record. The opinion of the Court of Appeals for the Ninth Circuit is reported at 298 F. 2d 129.

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[1]All citations to the "Record" refer to the Transcript of Record in the Court of Appeals.

Jurisdiction.

The judgment of the Court of Appeals was entered December 6, 1961. A petition for rehearing was denied on January 23, 1962. The petition for certiorari was filed on April 20, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1) and Section 24c of the Bankruptcy Act, 11 U. S. C., Sec. 47c.

Statutes Involved.

1. *California Civil Code, Sec. 3440.1:*

> ". . . the sale, transfer, assignment, or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, is conclusively presumed fraudulent and void as against the existing creditors of the vendor, transferor, assignor, or mortgagor, unless before the consummation of the sale, transfer, assignment, or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee does all of the following:
>
> "(a) Records at least 10 days before the consummation of the sale, transfer, assignment, or mortgage . . . a notice of the intended sale, transfer, assignment, or mortgage, which states the name and address of the intended vendor, transferor, assignor, or mortgagor and the name and address of the intended vendee, transferee, assignee, or mortgagee. The notice shall contain a general statement of the character of the merchandise or property intended to be sold, assigned,

transferred, or mortgaged, and show the date and place where the purchase price or consideration is to be paid.

"(b) Publishes a copy of the notice. . . ."

2. *Bankruptcy Act, Sec. 70e(1), 11 U. S. C., Sec. 110e(1):*

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

Question Presented.

Whether, as a matter of state law, there has been a proper or sufficient compliance with the requirements of Section 3440.1 of the California Civil Code in a case where the statutory notice recites that a mortgage will be delivered "and the consideration therefor paid" at a specified hour on a certain date, whereas in fact, most of the loans for which the mortgage was intended as security were made before and after the date set forth in the notice.

Statement.

Before the filing of the petition in bankruptcy on August 22, 1958, Jet Air-Age, Inc. was a machinist, engaged in the machine shop business in Gardena, California. [R. 27.] On February 19, 1958, petitioner made the first of a series of unsecured loans to the bankrupt, each being represented by a demand note.

By March 14, 1958, four advances had been made totaling $25,000. [R. 28.] At this point the parties agreed to put the borrowing on a secured basis. An escrow was opened at the office of petitioner's attorney for the purpose of effectuating a transaction whereby the bankrupt would chattel mortgage its machinery, equipment, fixtures and other personal property to secure the loans theretofore made and those to be made in the future, up to a specified maximum amount. [R. 27-28, 14-21.]

In connection with this transaction, a notice under Section 3440.1 of the California Civil Code was filed and published. It recited that the mortgage would be delivered "and the consideration therefor paid at 10:00 o'clock A.M., on the 28th day of March, 1958," at the attorney's office. [R. 29.]

Through the escrow, a new note for $25,000 was substituted for the previous four demand notes totaling the same amount. On March 28, 1958, the date specified in the notice, petitioner made two additional $5,000 loans to the bankrupt as part of the escrow arrangement. The escrow closed, the mortgage was delivered to petitioner, and the $10,000 turned over to the bankrupt at approximately 10:15 A.M. or 10:30 A.M. on March 28th, rather than at 10:00 A.M. as set forth in the notice. [R. 28-29.] Recordation of the mortgage occurred the same day. [R. 27.] Thereafter, at various times between June 9 and August 5, 1958, petitioner made four more loans to the bankrupt aggregating $21,000. [R. 28.]

In summary, of the total of $50,000 borrowed by the bankrupt for which petitioner claimed the mortgage as security, only $10,000 was advanced on March 28, 1958, the date specified in the notice.

There were in existence at the time of bankruptcy a number of the bankrupt's creditors having provable claims which arose prior to March 28, 1958. [R. 29.]

Under California law, a transaction which fails to comply properly with Section 3440.1 of the Civil Code is void as against the transferor's creditors whose claims antedate the defective transfer or mortgage. *Bumb v. United States*, 276 F. 2d 729 (C. A. 9, 1960); *Mitchell v. Setzler*, 84 Cal. App. 2d 716 (1948); *In re Sassard & Kimball*, 45 F. 2d 449 (C. A. 9, 1930), *rev'd sub nom. Moore v. Bay*, 284 U. S. 4 (1931). Respondent-trustee in bankruptcy, therefore, relied on the rights of those actual creditors and attacked petitioner's chattel mortgage under Section 70e(1) of the Bankruptcy Act, 11 U. S. C., Sec. 110e(1). The Referee in Bankruptcy ruled for respondent and declared the mortgage invalid. [R. 26-30.] On review and on the subsequent appeal, both the District Judge [R. 38-39] and the Court of Appeals for the Ninth Circuit affirmed.

ARGUMENT.

There Is No Federal Question Presented. Only a Question of Construction of a California Statute Is Involved, and It Was Properly Decided by All the Courts Below.

The petition for certiorari correctly admits that no federal question is presented. The only issue pertains to the technical construction of a state statute.

The purpose of California Civil Code, Section 3440.1 (commonly referred to as the "bulk sale" law) is to protect creditors of certain sellers or mortgagors in two ways: First, to give the creditors at least ten days' notice of an intended transfer so that they can levy on the physical property being transferred; and second, to afford them the alternative remedy of levying on the consideration for the transfer when the proceeds are received by the transferor. *Mitchell v. Setzler*, 84 Cal. App. 2d 716, 720 (1948); *Bumb v. United States*, 276 F. 2d 729, 734 (C. A. 9, 1960). The requirement that the statutory notice must set forth the date and place for the passage of the consideration relates to the second of these protections.

California follows the usual rule that an attachment, garnishment or execution on an asset reaches only the debtor's interest therein at the moment of levy, and not any after-acquired interest. *E.g., Dawson v. Bank of America*, 100 Cal. App. 2d 305 (1950); *cf. Kellogg v. Curry*, 101 Cal. App. 2d 856 (1951). Thus, a Section 3440.1 notice such as the one given by petitioner, which merely recites that the consideration will be paid on a specified date, adequately warns the transferor's creditors as to their second alternative remedy only if

the proceeds are in fact paid over at the time specified in the notice. Petitioner's loans for which the mortgage was intended as security were actually made for the most part either before or after the published date. The notice in this case therefore was misleading, for creditors who relied on it and who attempted to levy on the consideration for the transaction could not have caught any money previously or subsequently advanced by petitioner to its borrower.

For this reason, the mortgage was invalid as against the mortgagor's creditors whose claims antedated the transaction, and as against respondent-trustee in bankruptcy who derives the rights of those actual creditors under Section 70e(1) of the Bankruptcy Act, 11 U. S. C. Sec. 110e(1). The court below merely followed its previous decision in *Bumb v. United States*, 276 F. 2d 729 (C. A. 9, 1960), and the reasoning of the state court in *Mitchell v. Setzler*, 84 Cal. App. 2d 716 (1948).[2] No California case is to the contrary. *Stewart v. Leasure*, 12 Cal. App. 2d 652 (1936), cited by petitioner for the proposition that Section 3440.1

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[2]Petitioner's argument that a mortgage may be validly given in California for consideration other than a contemporaneous cash payment (Pet. pp. 7-9) is beside the point. Civil Code Section 3440.1 does not prohibit the giving of mortgages to secure antecedent, present, or future loans, or for non-cash consideration; it is only a notice statute. But if the consideration is not cash, or if it is to be paid on a date either before or after the delivery of the mortgage, the notice must be accurate and cannot erroneously set forth or imply that cash proceeds will be passed concurrently. This is all that the court below has held in its decisions in *Bumb v. United States* and in the present case.

does not apply where the consideration consists of an antecedent indebtedness (Pet. p. 12, n.3), is readily distinguishable. It was decided at a time when the statute contained different language.[3]

Certiorari should be denied in this case not only because there is a lack of a federal question, and the state law was correctly construed, but also because amendment of Section 3440.1 at the 1961 session of the California Legislature renders the point involved here of even less importance. There are as yet no judicial decisions interpreting the meaning of the bulk sales law in fact situations arising after September 15, 1961, the effective date of the new statute.[4]

Finally, *Lewis v. Manufacturers Nat. Bank*, 364 U. S. 603 (1961), referred to by petitioner (Pet. p. 12), is not in point. It involved only a construction of Section 70c of the Bankruptcy Act, 11 U. S. C. Sec. 110c, whereunder the trustee in bankruptcy may assert rights of an ideal, hypothetical creditor. In the

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[3]The bulk sale statute applicable in 1936 in *Stewart v. Leasure* provided that the notice must contain the date when and "the place where the purchase price or consideration, *if any there be*, is to be paid." A subsequent amendment eliminated the italicized phrase before the time that *Bumb v. United States* was decided.

[4]Senate Bill 1229, enacted effective September 15, 1961, eliminated "machinists" from the categories of persons required to comply with Civil Code, Section 3440.1. Thus, in future cases involving facts similar to those here presented, the bulk sales law will not apply at all. Moreover, the statute was amended by the same bill so as to permit the notice to recite that the consideration or purchase price will be paid "on or after" a specified date.

present case, on the other hand, the existence of actual creditors enabled respondent to rely on Section 70e(1) of the Act, and the court below correctly grounded its decision on this provision.[5]

Conclusion.

For the foregoing reasons, it is submitted that the petition for certiorari should be denied.

Respectfully submitted.

FRANCIS F. QUITTNER,
Attorney for Respondent.

QUITTNER, STUTMAN & TREISTER,
GEORGE M. TREISTER,
Of Counsel.

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[5]Before this Court's decision in *Lewis v. Manufacturers Nat. Bank* was announced, respondent had relied on Section 70e of the Bankruptcy Act as well as Section 70e(1). The Referee in Bankruptcy and the District Judge held petitioner's mortgage void under both sections. *Lewis* was decided, however, prior to the time the appeal was taken, and respondent accordingly abandoned his Section 70e theory. As a result, the Court of Appeals relied only on Section 70e(1), and, indeed, petitioner does not now question the application of 70e(1) if the state law was properly interpreted.